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| APPLICATION NO.   | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO.         | CONFIRMATION NO.       |
|---|-------------|----------------------|-----------------------------|------------------------|
| 09/897,100  | 07/03/2001  | Takeshi Ishida       | 826.1734                    | 1690                   |
| 21171   | 7590        | 05/07/2007           |                             |                        |
| STAAS & HALSEY LLP<br>SUITE 700<br>1201 NEW YORK AVENUE, N.W.<br>WASHINGTON, DC 20005 |             |                      | EXAMINER<br>SORRELL, ERON J |                        |
|   |             |                      | ART UNIT<br>2182            | PAPER NUMBER           |
|   |             |                      | MAIL DATE<br>05/07/2007     | DELIVERY MODE<br>PAPER |

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

|                              |                               |                               |  |
|------------------------------|-------------------------------|-------------------------------|--|
| <b>Office Action Summary</b> | Application No.<br>09/897,100 | Applicant(s)<br>ISHIDA ET AL. |  |
|                              | Examiner<br>Eron J. Sorrell   | Art Unit<br>2182              |  |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
  - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
  - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 27 February 2007.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-13 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-13 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 23 July 2001 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All    b) ☐ Some \*    c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date <u>12/20/06</u> . | 6) <input type="checkbox"/> Other: _____  |

DETAILED ACTION

*Continued Examination Under 37 CFR 1.114*

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 2/27/07 has been entered.

*Claim Rejections - 35 USC § 101*

2. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Claims 9-12 rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter.

3. Claim 9 is directed toward an apparatus however the elements that make up the apparatus can be reasonably construed as a software module or a software process. For example, the managing unit and server shifting unit can both be construed as

Art Unit: 2182

software, thus making the entire apparatus software, per se.

The same analysis holds for system claims 10-12.

*Claim Rejections - 35 USC § 103*

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 1-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Choquier et al. (U.S. Patent No. 5,951,694 hereinafter "Choquier") in view of Donaghue, Jr. (U.S. Patent No. 6,226,377 hereinafter "Donaghue").

6. Referring to program claims 1 and 7, method claim 6, machine readable medium claim 8, and apparatus claim 9, Choquier teaches a method, apparatus and program causing an information processing device (administration servers 134, see lines 4-12 of column 24) to execute a service managing method accommodating a plurality of service servers each rendering a service via a network in response to a service request from a client, and

Art Unit: 2182

distributing the service request to the plurality of service servers (see lines 26-35 of column 23), said method comprising:

managing the plurality of service servers by dividing the service servers to define a plurality of groups of service servers and dynamically shift service servers among the plurality of groups and render a service as a service quality of a group to which the shift is made (see lines 36-48 of column 23); and

reducing a load on a service server within any of the plurality of groups by using at least one service server with the lightest load as the service server within any of the plurality of groups, when the load on the service server within any of the plurality of groups increases, and a quality level to be rendered by any of the plurality of groups cannot be maintained (see lines 34-53 of column 24, wherein Choquier teaches determining when to add servers from one group experiencing high load from a group with a lower load).

Choquier fails to teach the service servers are grouped depending on quality levels of the rendered services into a high, low, and intermediate service groups, wherein the service request with a high service level requirement is preferentially processed while still processing service requests of a low service level requirement.

Art Unit: 2182

Donaghue teaches, in an analogous system, the service servers are grouped depending on quality levels of the rendered services into a high, low, and intermediate service groups (Donaghue teaches 1st, 2nd, and 3<sup>rd</sup> priority levels), wherein the intermediate group offers low level service during a normal time and reassigning servers between the server groups based upon the load and level of service (see lines 45-63 of column 8). Donaghue further teaches the service request with a high service level requirement is preferentially processed while still processing service requests of a low service level requirement (see lines 15-25 of column 3).

It would have been obvious to one of ordinary skill in the art at the time of the applicant's invention to modify the system and method of Choquier with the above teachings of Donaghue in order to more effectively utilize the available resources and maintain service level agreements as suggested by Donaghue (see lines 55-58 of column 1).

7. Referring to claim 2, Choquier teaches the plurality of service servers that are grouped comprise a storing unit storing information to which group each of the plurality of service servers belongs (see lines 21-27 of column 9).

Art Unit: 2182

8. Referring to claim 3, Donaghue teaches a service quality is the response time of the service server (see lines 44-52 of column 5). It would have been obvious to one of ordinary skill in the art at the time of the applicant's invention to modify the system and method of Choquier with the above teachings of Donaghue for the same reasons as mentioned above in the rejection of claim 1.

9. Referring to claim 4, Choquier teaches, the method further comprises recording and managing a log of service requests (see lines 33-46 of column 10); and generating a schedule for each date or day of the week based on the log recorded in the log managing step, and changing a way of dividing the service servers into groups according to a generated schedule (see lines 27-35 of column 23).

10. Referring to claim 5, Choquier teaches each of the plurality of service servers executes a load measuring step measuring a load value that a local service requires to process a service request; and teaches a server is shifted to a different group based on a load value of each service server, which is notified from the load measuring step.

Art Unit: 2182

Choquier fails to teach the service servers are grouped depending on quality levels of the rendered services into a high, low, and intermediate service groups.

Donaghue teaches, in an analogous system, the service servers are grouped depending on quality levels of the rendered services into a high, low, and intermediate service groups (Donaghue teaches 1st, 2nd, and 3<sup>rd</sup> priority levels) and reassigning servers between the server groups based upon the load and level of service (see lines 45-63 of column 8).

It would have been obvious to one of ordinary skill in the art at the time of the applicant's invention to modify the system and method of Choquier with the above teachings of Donaghue for the same reasons as mentioned above in the rejection of claim 1.

11. Referring to claim 10 Choquier teaches a system providing services over at least one network, comprising:

service servers grouped according to services provided (see lines 36-48 of column 23), however fails to teach the service servers are grouped depending on quality levels or that the service request with a high service level requirement is preferentially processed while still processing service requests of a low service level requirement.



Art Unit: 2182

Donaghue teaches, in an analogous system, the service servers are grouped depending on quality levels of the rendered services into a high, low, and intermediate service groups (Donaghue teaches 1st, 2nd, and 3<sup>rd</sup> priority levels) and reassigning servers between the server groups based upon the load and level of service (see lines 45-63 of column 8). Donaghue further teaches the service request with a high service level requirement is preferentially processed while still processing service requests of a low service level requirement (see lines 15-25 of column 3).

It would have been obvious to one of ordinary skill in the art at the time of the applicant's invention to modify the system and method of Choquier with the above teachings of Donaghue in order to more effectively utilize the available resources and maintain service level agreements as suggested by Donaghue (see lines 55-58 of column 1).

12. Referring to claims 11 and 12, Choquier teaches, a load shifting unit reducing a load on a selected server within any group of the service server wherein the load shifting unit reduces the load on the selected server by shifting a portion of the load from the selected server to at least one server having a lightest load (see lines 34-53 of column 24; wherein Choquier

Art Unit: 2182

teaches determining when to add servers from one group experiencing high load from a group with a lower load).

Donaghue teaches, in an analogous system, the service servers are grouped depending on quality levels of the rendered services into a high, low, and intermediate service groups (Donaghue teaches 1st, 2nd, and 3<sup>rd</sup> priority levels) and reassigning servers between the server groups based upon the load and level of service (see lines 45-63 of column 8).

It would have been obvious to one of ordinary skill in the art at the time of the applicant's invention to modify the system and method of Choquier with the above teachings of Donaghue for the same reasons as mentioned above in the rejection of claim 1.

#### *Response to Arguments*

13. Applicant's arguments filed 2/27/07 have been fully considered but they are not persuasive. The applicant argues:

1) Donaghue fails to teach groups of service servers of reassigning service servers between service server groups (see last paragraph of page 7 of applicant's remarks);

2) the prior art fails to teach the newly added limitation of preferentially processing the higher level request while

Art Unit: 2182

still processing the lower level request, instead Donaghue teaches starving the lower level requests of processing power (see first paragraph of page 8);

3) the Examiner does not provide a motivation to combine Choquier with Donghue.

As per argument 1, the Examiner has cited Choquier for the teaching of groups of service servers of reassigning service servers between service server groups see lines 24-48 of column 23 of Choquier and the rejection of claims 1,6,7,9, and 10 above.

As per argument 2, the Examiner disagrees. Donaghue does not teach starving lower request. Instead Donaghue teaches preferentially processing the higher level request while still processing the lower level request (see lines 50-52 of column 3, wherein Donaghue teaches all service levels have there requests processed.

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention

Art Unit: 2182

where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, It would have been obvious to one of ordinary skill in the art at the time of the applicant's invention to modify the system and method of Choquier with the above teachings of Donaghue in order to more effectively utilize the available resources and maintain service level agreements as suggested by Donaghue (see lines 55-58 of column 1).

#### *Conclusion*

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Eron J. Sorrell whose telephone number is 571 272-4160. The examiner can normally be reached on Monday-Friday 8:00AM - 4:30PM.

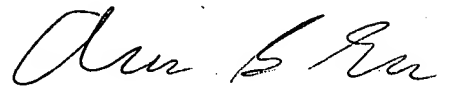
If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Kim Huynh can be reached on 571-272-4147. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 2182

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

EJS

4/27/2007



4/27/07